

BRB No. 92-2360

ALBERT C. HARLING)	
)	
Claimant)	
)	
v.)	
)	
KIEWIT-GRICE)	
)	
and)	
)	
AXIA SERVICES, INCORPORATED)	
)	
Employer/Administrator-)	
Petitioners)	
)	
and)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	DATE ISSUED: _____
UNITED STATES DEPARTMENT)	
)	
Respondent)	DECISION AND ORDER

Appeal of the Decision and Order of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Russell A. Metz (Metz, Frol & Jorgensen, P.S.), Seattle, Washington, for employer/administrator.

Karen B. Kracov (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (91-LHC-1707) of Administrative Law Judge Alexander Karst rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On March 25, 1985, claimant sustained a serious injury while working for employer when a large wood concrete form weighing about 1,000 pounds fell on him, striking his back and left side. Claimant's spine was fractured, his first lumbar vertebra was crushed and a bone fragment was forced against his spinal canal. Claimant underwent spinal fusion surgery and had metal rods inserted in his back. He was hospitalized for about one month, after which he had a year of convalescence at home. Claimant has not been able to return to work since this injury, and sought permanent total disability compensation under the Act. Subsequent to the hearing, but prior to the issuance of the administrative law judge's Decision and Order in this case, claimant and the employer stipulated that claimant is permanently totally disabled. Accordingly, the only unresolved issue pending for adjudication before the administrative law judge at the time he issued his Decision and Order was employer's entitlement to relief under Section 8(f) of the Act. 33 U.S.C. §908(f).

In his Decision and Order, the administrative law judge denied employer Section 8(f) relief. It was undisputed that claimant had numerous pre-existing conditions, including injuries to his right leg resulting from a gun shot wound, hypertension, degeneration of his spine, and various injuries due to car accidents. The Director did not dispute that these conditions constituted manifest, pre-existing permanent partial disabilities under Section 8(f). The only issue before the administrative law judge was thus whether claimant's total disability was due solely to his work-related injury on March 25, 1985. In analyzing this issue, the administrative law judge concluded that the evidence established "that the work-related injury alone left him so crippled that by reason of it alone he would never have been able to return to his former work." Decision and Order at 3. He further concluded that while it may be true that claimant's other conditions may have also disabled him, and that "the pre-existing conditions might render him disabled, so to speak, twice over," *Id.*, these facts were irrelevant to the question of contribution under Section 8(f). Accordingly, the administrative law judge determined that as employer had not shown that claimant's 1985 injury alone would not have totally disabled him, employer was not entitled to Section 8(f) relief.

On appeal, employer contends that in denying Section 8(f) relief the administrative law judge analyzed the contribution element of Section 8(f) under an incorrect legal standard. Employer also contends that the administrative law judge failed to thoroughly discuss the medical evidence, and that, in any event, the evidence submitted is sufficient to establish contribution even under the strict standard followed by the administrative law judge. The Director, Office of Worker's Compensation Programs (the Director), responds, urging that the administrative law judge's denial of Section 8(f) relief be affirmed. Employer replies, reiterating the arguments it made in its Petition for

Review.

Section 8(f) relief is available to employer if it establishes: (1) that the employee had a pre-existing permanent partial disability; (2) that the pre-existing disability was manifest to employer prior to the subsequent work injury; and (3) that the pre-existing conditions combine with the subsequent injury so that the employee's permanent total disability is not due to the most recent injury alone. See *Bunge Corp. v. Director, OWCP*, 951 F.2d 1109, 25 BRBS 82 (CRT) (9th Cir. 1991); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 147 (1991); 33 U.S.C. §908(f). The burden of proof is on employer to show each of the elements necessary for Section 8(f) relief. *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983).

We reject employer's arguments and affirm the administrative law judge's determination that employer failed to establish that claimant's disability was not solely due to his final injury. The administrative law judge properly found that in cases arising within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, employer must demonstrate that the subsequent work injury alone would not have caused claimant's permanent total disability. See *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1353, 27 BRBS 41 (CRT) (9th Cir. 1993). Although employer contends that the administrative law judge erred in analyzing contribution under the stringent standard set forth by the United States Court of Appeals for the Second Circuit in *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992), *rev'g Luccitelli v. General Dynamics Corp.*, 25 BRBS 30 (1991), as this case arises from the Ninth Circuit, we note that the Ninth Circuit explicitly cited the *Luccitelli* standard with approval in *E.P. Paup Co.*, 999 F.2d at 1353, 27 BRBS at 54 (CRT). Thus, contrary to employer's assertions, it is not sufficient that claimant's injuries combine to create a greater degree of disability or physical impairment than would have occurred based on the subsequent work injury alone. *Id.*, 999 F.2d at 1353, 27 BRBS at 54 (CRT). If the later injury alone is sufficient to render claimant permanently totally disabled, the fact that his pre-existing conditions may have made his total disability even greater is not determinative. *Id.*; *FMC Corp. v. Director, OWCP*, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1989).

We also reject employer's contention that the medical opinions of Drs. Sears, Hogan, Adams and Wiese are sufficient to establish contribution under Section 8(f). Drs. Sears and Hogan noted that claimant suffered from pre-existing conditions, including arthritis of the right knee, hypertension, and a history of cerebral ischemia and stated these injuries in combination with the 1985 back condition resulted in a greater degree of disability than would have resulted from his 1985 injury. Ex. 2, p. 99. Their opinions, however, are not sufficient, because they do not demonstrate that the work-related injury alone did not cause claimant's permanent total disability. Dr. Wiese's statement that claimant exhibits surgical decompression of his spine because of his pre-existing lumbar stenosis which, though not caused by the accident, was aggravated by it, Ex. 1.84, and Dr. Ray's opinion that claimant's industrial injury aggravated his pre-existing degenerative condition and contributed to his disability, Ex. 1.73, are similarly insufficient.

Employer also cites the May 14, 1991, discharge summary of Dr. Adams, the doctor who treated claimant for his post-injury acute brain stem cerebral-vascular accident in support of its contribution argument. Ex. 1.87. This report lists many of claimant's pre-existing problems in the context of setting forth his medical history but is not relevant to the contribution of prior injuries to claimant's current condition, as Dr. Adams voiced no opinion regarding the disabling effects of the prior conditions and the most recent work injury or their relation to claimant's overall condition. Moreover, in his deposition testimony, Dr. Adams specifically attributed claimant's permanent total disability to the work injury. Dep. at 31. The remaining medical evidence of record, which consists of various hospital reports relating to claimant's surgery and reports from the Orthopaedic Panel Consultants, is irrelevant to the issue presented in this case. Because there is no evidence in the record sufficient to establish that claimant's industrial back injury alone was not totally disabling, we affirm the administrative law judge's conclusion that employer did not establish the contribution requirement of Section 8(f) in this case. His denial of Section 8(f) relief is therefore affirmed.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge